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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 790 Plaintiff, v. JOSEPH P. NORELLI, Individually, and in his capacity as Regional Director, NATIONAL LABOR RELATIONS BOARD, REGION 20; ROBERT J. BATTISTA, Individually and in his Capacity as Chairman and Member of the NATIONAL LABOR RELATIONS BOARD; PETER N. KIRSANOW, Individually, and in his Capacity as a Member, NATIONAL LABOR RELATIONS BOARD; DENNIS P. WALSH, Individually, and in his Capacity as a Member, NATIONAL LABOR RELATIONS BOARD; WILMA B. LIEBMAN, Individually, and in her Capacity as a Member of the NATIONAL LABOR RELATIONS BOARD; PETER CARY CHAUMBER, Individually, and in his Capacity as a Member, NATIONAL LABOR RELATIONS BOARD, Defendants.	No. C07-2766 PJH **OPPOSITION TO DEFENDANTS' (AND PROPOSED INTERVENER'S) MOTION TO DISMISS** Date: Time: Judge: Honorable Phyllis J. Hamilton

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I. INTRODUCTION

Plaintiff Service Employees International Union, Local 790 ("Local 790" or "Plaintiff") respectfully submits this Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss.

As argued in its Opposition to Motion for Leave to Intervene, Plaintiff maintains that the Motion for Leave to Intervene filed by Messrs. Taubman and Young should be denied because, *inter alia*, the prospective Intervener's purported interests in this litigation are more than adequately represented by Defendants and their counsel. Plaintiff also notes that the proposed Intervener's Motion to Dismiss adds nothing to the analysis presented to the Court by Defendants, which underscores the inappropriateness of granting the Motion to Intervene. Nevertheless, Plaintiff's arguments in this memorandum are respectfully submitted in Opposition to the Motions to Dismiss of both the NLRB Defendants and the proposed Intervener.

Plaintiff's invocation of this Court's original jurisdiction in equity is proper because, as argued herein, the National Labor Relations Board (hereinafter "NLRB" or "Board") and each of the named Defendants (collectively referred to hereinafter as "Defendants") have violated a clear statutory prohibition and Plaintiff has no other means by which to obtain relief for resulting harm it has suffered and continues to suffer. (See *National Association of Agriculture Employees v. Federal Labor Relations Authority*, 473 F.3d 983, 988, fn 5 (9th Cir. 2007) (hereinafter "*National Association of Agricultural Employees*"); *Bays v. Miller*, 524 F.2d 631 (9th Cir. 1975) (hereinafter "*Bays*"); *Leedom v. Kyne*, 358 U.S. 184 (1958) (hereinafter "*Leedom*".)

Specifically, Defendants have improperly ordered a secret-ballot election regarding whether to "de-authorize" a union security clause contained within a collective bargaining agreement between Local 790 and Covenant Aviation Security, LLC (hereinafter "Employer" or "Covenant"), based on a de-authorization petition that was prematurely filed, and the showing of support for which was improperly and prematurely gathered, before any collective bargaining agreement containing a union security clause was in effect.

The Board's Decision and Order setting forth Defendants' rationale for requiring the disputed election violates a clear Congressional prohibition, codified in National Labor Relations

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Act (hereinafter "NLRA") § 9(e)(1), 29 U.S.C. § 159(e)(1), which disallows such an election except upon the production of a petition signed by at least 30 percent of a bargaining unit at a time when the members of the unit are covered by a collective bargaining agreement containing a union security clause.

The Board improperly ordered an election based on a petition that was signed by employees who were neither covered by a collective bargaining agreement nor a union security clause. As discussed herein, the plain language of § 9(e)(1), cases that have construed its language and effect, and the legislative history of that provision make clear that Congress did not approve prospective use of the de-authorization process to preclude a Union from negotiating a union security clause. To the contrary, the plain language of the statute and its legislative history demonstrate that only when a union security agreement is *in effect* does § 9(e)(1) confer authority upon bargaining unit members to initiate a proceeding to "rescind" the agreement and upon the Board to order an election based on such a petition.

Sound labor policy considerations, involving both administrative economy and preservation of meaningful employee choice regarding union membership and support, underlie this clear statutory command, as discussed *infra*. It is respectfully submitted that this Court should adopt the rationale articulated by both NLRB Regional Director Joseph P. Norelli (hereinafter "Norelli"), whose decision the NLRB majority overturned, and the well-reasoned dissent authored by NLRB Member Dennis P.Walsh (hereinafter "Walsh").

The NLRA provides no procedure by which to seek judicial review of Board determinations on de-authorization issues arising under NLRA § 9(e)(1). Nor, as discussed below, is there any indirect means by which to secure judicial review, as exists for Board orders regarding bargaining unit determinations. Moreover, Plaintiff herein does not seek review of the Board's exercise of discretion granted to it by statute. Rather, Plaintiff asks this court to strike down an action of the Board undertaken in excess of its jurisdiction and in violation of a clear statutory prohibition. Thus, under settled law, as discussed herein, even were there a mechanism by which to obtain judicial review of the Board's exercise of its discretion over a de-authorization petition, invocation of this court's jurisdiction to review the Board's extra-jurisdictional action would be

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proper. Granting such review is even more strongly proper and necessary where, as here, no such ordinary means by which to seek review of the Board's action is available.

II. FACTS

The material facts at issue herein are undisputed.[1] Local 790 is a labor organization within the meaning of the NLRA, 29 U.S.C. § 152(5). Covenant is a corporation which, under contract with the federal Transportation Security Administration ("TSA"), employs security personnel who work, as relevant here, at the San Francisco International Airport.

On September 30, 2005, a panel of neutrals jointly selected by Local 790 and Covenant conducted a check of written employee authorizations and determined that a majority of Covenant employees at the San Francisco International Airport in an appropriate bargaining unit had selected Local 790 as their collective bargaining representative.

Based on that "card check", Covenant recognized Local 790 as its employees' collective bargaining agent on October 3, 2005, and began negotiations with Local 790 on or about November 18, 2005. Those negotiations resulted in a tentative collective bargaining agreement, the terms of which Local 790 was first able to share with bargaining unit members on December 28, 2005. Thereafter, Local 790 conducted a ratification vote among bargaining unit employees between December 28 and December 31, 2005.

The bargaining unit members ratified the agreement by a vote of 378 to 229. Local 790 did not sign the contract until January 12, 2006, and Covenant did not sign the agreement until January 13, 2006.

On January 11, 2006, prior to either party signing the tentative agreement, Stephen J. Burke (hereinafter "Burke"), an employee of Covenant, filed a petition with NLRB Region 20, seeking a "de-authorization" vote among Covenant bargaining unit members, pursuant to NLRA § 9(e)(1), 29 U.S.C. § 159(e)(1).

[1] All facts recited herein are taken from the factual allegations in Plaintiff's verified Complaint, which, in turn, are taken from the Decision of NLRB Regional Director Joseph P. Norelli (authenticated and attached to the Complaint as Exhibit 1) or from the Decision and Order of the NLRB, dated March 30, 2007, reported at 349 NLRB No. 67 (authenticated and attached to the Complaint as Exhibit 2).

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NLRB Regional Director Norelli conducted an investigation of the de-authorization petition and ultimately dismissed it on March 23, 2006, based on several grounds, summarized as follows:

a. The petition was filed on January 11, 2006, two days before the Collective Bargaining Agreement between Local 790 and Covenant was executed;

b. Nearly 70 percent of the signatures submitted in support of the petition were dated in October 2005, and were, therefore, collected over a month before contract negotiations had begun and two or more months before terms of the tentative agreement were disclosed to affected employees for a ratification vote;

c. Approximately 92 percent of the signatures submitted in support of the petition pre-dated the ratification vote, and every signature pre-dated execution of the Collective Bargaining Agreement on January 13, 2006;

d. The tally of the contract ratification vote conducted by Local 790 between December 28 and December 31, 2005, established that 378 employees voted in favor of the agreement, including the Union security clause at issue herein, and 229 voted against it.

Based on the language of NLRA § 9(e)(1), 29 U.S.C. § 159(e)(1), the legislative history of that provision, and the language of the relevant NLRB petition form, Norelli concluded that the statute "contemplates that a condition precedent to this type of petition is the existence of a Union Security Clause to which employees are subject." (Complaint ¶¶ 22-23 and Ex. 1 at p. 2.)

As the de-authorization petition was filed on January 11, 2006 and the collective bargaining agreement between Covenant and Local 790, including the Union security clause, did not become effective until January 13, 2006, Norelli concluded that the petition was prematurely filed because there was no security clause in effect at that time.

Further, Norelli concluded that the petition was defective for the additional and more fundamental reason that NLRA § 9(e)(1) requires that such a petition be supported by at least 30 percent of employees covered by an agreement containing the Union security clause, such that the showing of support "must occur in the context of an existing, rather than a prospective and potential, Union Security Clause." (Complaint Ex. 1, p. 3.)

Norelli summarized his analysis as follows:

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> Thus, like the Petition, the showing of interest was premature, collected before the Union Security Clause had taken effect and before employees knew what benefits the Collective Bargaining Agreement would provide. This showing of interest does not comport with the plain language of the Act, with the history that led to the Amendment that led to the de-authorization procedure now codified in Section 9(e)(1), or the duty responsibly to budget the agency's resources. Accordingly, the deficiency of the showing of interest also compels dismissal of the instant Petition.

(Complaint Ex. 1, p. 4.)

Burke requested NLRB review of Norelli's decision on April 6, 2006. On March 30, 2007, two Members of the three-Member NLRB panel, Robert J. Battista and Peter N. Kirsanow, issued a Decision and Order reversing dismissal of the petition, reinstating the de-authorization petition, and remanding the matter to Norelli for further action. The Board accepted every material fact found by Norelli concerning the timing of the gathering of signatures in support of the petition, the date of filing of the petition, and the effective date of the agreement between Local 790 and Covenant, including its Union security clause. The majority characterized the issue presented as being one of "first impression: Whether the showing of interest supporting a de-authorization petition may predate the execution of a contract containing a union-security provision." The majority concluded that the showing of interest could lawfully precede the effective date of the agreement containing the union security clause.

Member Walsh dissented from the majority's holding and analysis, reasoning, *inter alia*, as follows:

> The plain meaning of Section 9(e)(1) is that the showing of interest for a deauthorization petition must be gathered at a time when the employees are actually subject to a union-security provision. The statute explicitly says that a deauthorization petition must be supported by 30 percent or more of the employees "*in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to Section 8(a)(3).*"

(Complaint Ex. 2, p. 6, emphasis in original.) Walsh further observed that employees are ill-equipped to decide whether to financially support their union when they have yet to witness what the union is capable of achieving on their behalf. (*Ibid*.)

Walsh also reviewed the legislative history of § 9(e)(1) (discussed *infra*), and observed that in 1951, Congress eliminated a requirement that Union security clauses, to be effective, must be

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authorized by a majority vote of the bargaining unit. Walsh observed,

> In eliminating authorization elections and devising the current statutory scheme, Congress explicitly aimed to avoid the unnecessary and inefficient expenses involved in the authorization process, while simultaneously protecting the right of employees to choose to free themselves of an unwanted union-security clause.

(*Id*. at p. 7, citing H.R. Rep. No. 1082, 82d Cong., 1st Sess., at 2-3 (1951).)

Walsh reasoned that "[u]sing Board resources to conduct an election when the majority of the signatures supporting the petition were collected before the parties even began negotiating a contract exemplifies the kind of inefficiency that Congress sought to eliminate by doing away with authorization elections." (*Ibid*.) At the same time, Walsh noted, "dismissing the petition leaves intact the right of employees to promptly deauthorize the union-security clause if they desire to do so." (*Id*.)

Walsh took issue with the majority for ignoring the plain meaning of § 9(e)(1), stating that the majority "strains to find an ambiguity in the statutory language that simply is not there." (*Id*.) Nothing in the statutory language suggests that employees need only be covered by a union security clause when a de-authorization petition is filed, as opposed to when the signatures are gathered, the dissent maintained. "The plain language of the Act dictates that the signatures supporting a deauthorization petition must be signatures of employees who are already subject to an effective union-security provision," contended Walsh.

Pursuant to the NLRB majority's Decision and Order, on April 5, 2007, Norelli issued an "Order Scheduling Hearing" reinstating the January 2006 de-authorization petition for the apparent purpose of processing it for a de-authorization election.

On April 6, 2007, proposed Intervener Burke recycled the petition he had filed on January 11, 2006, and refiled it, supported by the same signatures, which had been gathered when no collective bargaining agreement containing a union security clause was in effect.

On May 1, 2007, NLRB Region 20 Regional Director Joseph P. Norelli issued a written notice, announcing that a secret-ballot de-authorization election would commence on June 4, 2007, with the mailing of ballots to members of the bargaining unit represented by Local 790. (See Declaration of David Rosenfeld in support of Motion for Temporary Restraining Order

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("Rosenfeld TRO Dec."), at ¶ 5.) The election was subsequently suspended briefly due to the fact that Covenant representatives were unable to produce an "Excelsior" list of bargaining unit members to the NLRB because TSA opposed production of that list by Covenant on national security grounds. (*Id*. at ¶ 6.)

On June 1, 2007, the Honorable Phyllis J. Hamilton issued an Order to Show Cause Why Preliminary Injunction Should Not Issue and set the matter for a hearing on June 27, 2007 at 9:00 a.m. Several hours later, after Judge Hamilton commenced a three-week leave from the court, Defendants announced that the Excelsior list issue had been resolved and expressed their intent to commence the disputed election by mailing out ballots on June 22, 2007, five days before the scheduled Show Cause hearing. (*Id*. at ¶ 21.)

On June 8, 2007, Plaintiff filed a Motion for Temporary Restraining Order Pending Scheduled Hearing on Preliminary Injunction, Set for June 27, 2007. Defendants opposed that motion. At the time of submission of this Opposition to Motions to Dismiss, the TRO Motion was still pending.

III. ARGUMENT

Defendants' arguments in support of their Motion to Dismiss are identical to their arguments in opposition to Plaintiff's Motion for Temporary Restraining Order and Plaintiff's Motion for Preliminary Injunction. Plaintiff incorporates herein by reference its Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, its Reply Memorandum of Points and Authorities in Support of Temporary Restraining Order, and its Reply Memorandum in Support of Preliminary Injunction.

Plaintiff also respectfully submits the following arguments.

A. *LEEDOM* ESTABLISHED THAT THIS COURT POSSESSES JURISDICTION UNDER 28 U.S.C. § 1337 TO ADJUDICATE AN ORIGINAL SUIT IN EQUITY CHALLENGING AN *ULTRA VIRES* ACTION BY THE NLRB IN VIOLATION OF A MANDATORY STATUTORY COMMAND.

Defendants mischaracterize Plaintiff's Complaint for Declaratory and Injunctive Relief when they assert that the central issue here is whether the Court possesses jurisdiction "to review

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or enjoin the Board's exercise of its discretion pursuant to Section 9(e)(1) of the National Labor Relations Act … to conduct an election for employees to consider deauthorizing a union-security agreement." (Docket Document 22 at 1, lines 8-13.)[2] As argued at length in Plaintiff's Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, its Reply Memorandum of Points and Authorities in Support of Temporary Restraining Order, and its Reply Memorandum in Support of Preliminary Injunction, Plaintiff does not seek this Court's review of the Board's exercise of statutorily-conferred discretion. To the contrary, Plaintiff asks this Court to overturn an action of the Board in excess of its jurisdiction because it directly violates a clear, mandatory, statutory command in Section 9(e)(1) of the NLRA, 29 U.S.C. § 159(e)(1). That provision mandates that a de-authorization election may only be based on a petition supported by signatures of 30 percent or more of the members of a bargaining unit at a time when they are covered by a collective bargaining agreement containing a union-security clause. It is undisputed that the petition giving rise to the election at issue herein was not supported by signatures of employees who were covered by a collective bargaining agreement containing a union security clause. Hence, the Board's Decision and Order constitute an *ultra vires* action of the Board.

Defendants misconstrue the content of the U.S. Supreme Court's ruling in *Leedom v. Kyne*, 358 U.S. 184 (1958) ("*Leedom*"), and its application to this case. As argued at length in Plaintiff's Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, its Reply Memorandum of Points and Authorities in Support of Temporary Restraining Order, and its Reply Memorandum in Support of Preliminary Injunction, the Court in *Leedom* held that the District Court possesses jurisdiction under 28 U.S.C. § 1337 to entertain an original suit in equity which challenges an action by the NLRB undertaken in excess of the Board's jurisdiction because it violated a clear statutory mandate. *Leedom*, 358 U.S. at 190.

[2] Proposed Intervener makes a similar, unmeritorious claim in its Motion to Dismiss. Proposed Intervener is correct that whether a de-authorization petition may be based on signatures of employees who are not covered by a collective bargaining agreement containing a union security clause is an important issue in this case. Its relevance is that the Board, by finding such a petition valid, violated a clear statutory mandate, set forth at NLRA Section 9(e)(1), and thereby acted in excess of its statutory jurisdiction, which is what gives this Court jurisdiction under the *Leedom* analysis.

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Thus, where, as here, the Board has acted in excess of its statutory jurisdiction, the *Leedom* analysis explains that the court's general jurisdiction in equity extends to scrutiny of the agency's *ultra vires* action. Such jurisdiction does not depend on a statutory jurisdictional grant because it is not invoked by a petition for review of the agency's exercise of discretion vested in it by Congress. To the contrary, the proceedings herein constitute a request by Plaintiff that the Court overturn an action by the NLRB in excess of its statutory jurisdiction. Consequently, Defendants' dissertation on confinement of the court's jurisdiction to situations where such jurisdiction is statutorily granted (See Docket Document 22 at 6-7) is wholly inapposite to this case.

Contrary to Defendants' deceptive characterization at pages 16 to 17 of their Motion to Dismiss (Docket 22 at 16-17), *Local Union No. 714, International Brotherhood of Teamsters v. Madden*, 343 F.2d 497 (7th Cir. 1965) ("*Madden*"), corroborates the appropriateness of judicial review of the Board's *ultra vires* action at issue herein. In *Madden* the Seventh Circuit, consistent with the holding in *Leedom*, stated, "A prerequisite to review of the Board's order is the determination by the District Court that there is a violation of a clear and mandatory provision of the Act." (*Id*. at 499.) It is true that the Court in *Madden* found that on the facts particular to that case, the Board's order of an election without first holding a formal hearing did not violate a clear and mandatory provision of the Act. There is nothing about that fact-specific holding that undermines the Seventh Circuit's general application of, and agreement with, the principal from *Leedom* that the Court possesses jurisdiction to overturn *ultra vires* actions of the Board. The issue here is not whether the Board should have held a formal hearing, as in *Madden*. The issue here is that the Board ordered an election based on a petition that was not signed by employees who were covered by a collective bargaining agreement containing a union security clause, which is a statutory prerequisite to Board action set forth at Section 9(e)(1) of the NLRA, 29 U.S.C. § 159(e)(1). *Madden*, like the *Leedom* case it applies, establishes that the District Court unequivocally possesses jurisdiction under such circumstances.

Defendants attempt to distract this Court from Plaintiff's substantive claim: that the Board acted *ultra vires* and must be enjoined from implementing its extra-jurisdictional Order. Rather than grapple with the settled principle under the *Leedom* analysis that this Court possesses

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jurisdiction to review and overturn *ultra vires* actions of the Board, Defendants present an unmeritorious argument that this is a representation case and that rules governing such cases apply here. As argued in the following section, this unequivocally is not a representation case and Defendants' arguments against this court's exercise of jurisdiction to review the Board's *ultra vires* actions are wholly without merit.

B. THIS IS NOT A REPRESENTATION CASE, SO THE AUTHORITIES GOVERNING JUDICIAL REVIEW OF REPRESENTATION RULINGS ARE IMMATERIAL; PLAINTIFF HAS NO MEANS BY WHICH TO OBTAIN JUDICIAL REVIEW, INDIRECT OR OTHERWISE, OTHER THAN BY THIS LAWSUIT.

Defendants devote much of their brief to citing wholly inapposite case law when they repeatedly mistakenly identify this case as a "representation" case. Defendants never provide authority for that erroneous characterization. Instead, they attempt to distract the court by citing and expounding upon rules of law that do not apply to the de-authorization proceeding at issue herein.

Specifically, Defendants correctly recite the law governing representation cases at pages 7 to 9 of their Opposition to Preliminary Injunction. (Docket Document 22 at 7-9.) They correctly point out, as did Plaintiff in its Memorandum of Points and Authorities In Support of Preliminary Injunction, its Reply Memorandum of Points and Authorities in Support of Temporary Restraining Order, and its Reply Memorandum in Support of Preliminary Injunction, that, in representation cases, i.e., ones in which the determination of an appropriate bargaining unit and matters related to the union's certification as exclusive bargaining representative are determined, there is no right to direct judicial review of NLRB rulings. Rather, in such cases, review may be obtained indirectly through seeking judicial review of a related unfair labor practice charge, triggered by one party's refusal to bargain because of its dispute over the representation issue. This, as discussed in Plaintiff's previous memoranda is a "technical refusal to bargain."

The problem with Defendants' analysis is that it erroneously suggests that the rulings regarding representation cases apply to *this* case, apparently because both sorts of cases arise under Section 9 of the NLRA, 29 U.S.C. § 159. Defendants conflate *de-authorization proceedings*, under

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which employees are permitted by NLRA § 9(e)(1) to petition the Board for an election to rescind a union security clause negotiated in a collective bargaining agreement by those employees' exclusive representative, with *representation proceedings,* under which the determination of an appropriate unit and the designation of an exclusive representative are determined, pursuant to NLRA § 9(a), (b), and (c). NLRB rulings in representation cases can be reviewed indirectly for abuse of discretion through the technical refusal to bargain. No such procedure is available for review, indirect or otherwise, of the NLRB's ruling on a de-authorization issue under NLRA §9(e)(1).

Thus, Defendants misrepresent the applicable law when they cite cases such as *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964) ("*Boire*") and *Bays v. Miller*, 524 F.2d 631, 633 (9th Cir. 1975) ("*Bays*") as holding that review of a de-authorization ruling has been relegated by Congress to use of the technical-refusal-to-bargain procedure. (Document 22 at 7-9.) Plaintiff brought cases like *Boire* and *Bays* to the attention of this Court in its opening memorandum in order to illustrate that, *unlike in representation proceedings*, there is no procedure by which to obtain judicial review of the Board's action in a de-authorization proceeding. Defendants simply ignore this distinction and pretend that de-authorization proceedings are a category of representation proceedings, which they indisputably are not.

Thus, Defendants assert a fact only tangentially relevant to this proceeding when they state "Consistent with *Boire* [*v. Greyhound,* 376 U.S. 473 (1964)], the courts have refused to extend their jurisdictional reach to review the Board's representation determinations alleged to have resulted in an error of law, where the Board did not act in violation of a specific statutory command." (Docket Document 22 at 11, lines 1-3; citations omitted.) It is true that representation rulings cannot be directly reviewed for errors of law. But, that point is irrelevant to this proceeding on two grounds: this is not a representation case and Plaintiff does not seek review of the Board's order for an error of law or abuse of discretion. In accordance with the rule set forth in *Leedom*, Plaintiff asks this court to overturn the Board's issuance of an Order in excess of its jurisdiction that violates a mandatory statutory command.

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For the same reasons, Defendants' recitation of cases in which the courts do not exercise jurisdiction to correct errors of law or abuses of statutorily conferred discretion at pages 9 to 11 of Defendants' Opposition to Preliminary Injunction have no relevance to this case, other than to underscore that this is not a petition for review in the ordinary sense, as the Court in *Leedom* explained. It is a request to have the court overturn an *ultra vires* act of the Board.

C. DEFENDANTS' REFILING OF THE SAME PREMATURELY GATHERED SIGNATURES UNDER THE COVER OF A RECYCLED PETITION DOES NOT CURE THE JURISDICTIONAL DEFECT IN THE BOARD'S DECISION AND ORDER.

Defendants disingenuously argue that Plaintiff's case lacks merit because the disputed election purportedly is based upon a "new" petition that was filed in April 2007, well after the agreement containing the union security clause went into effect. (Document 22 at 5, lines 4-7; 12, lines 5-7.) Defendants neglect to acknowledge that this allegedly "new" petition is, in fact, the same petition filed on January 11, 2006, recycled with a new date and, most importantly, that it is based on *the same prematurely gathered signatures* as the original petition.

Defendants may be correct that the refiling of the petition after the agreement went into effect could satisfy the requirement that the petition be filed only when such an agreement is in effect. However, that maneuver does not cure the jurisdictional defect in the Board's ruling because the fact remains that the signatures were gathered not only before an agreement was executed, but before negotiations for it even had begun.[3]

The main issue in dispute in this case is whether the Board is prohibited by Section 9(e)(1) of the NLRA, 29 U.S.C. § 159(e)(1), from ordering an election based on a petition signed by employees in a bargaining unit that was not covered by an agreement containing a union security clause when the signatures were gathered. As discussed in Plaintiff's Memorandum of Points and

[3] It bears re-emphasis that the tally of the contract ratification vote conducted by Local 790 between December 28 and December 31, 2005, established that 378 employees voted in favor of the agreement, *including the Union security clause at issue herein*, and 229 voted against it. (Complaint ¶¶ 22-23 and Ex. 1 at p. 2.) That vote occurred *after* Burke collected his signatures. Thus, Burke indisputably attempted to use the de-authorization procedure preemptively. By the time he filed his stale signatures, the same bargaining unit had voted by a majority to *authorize* the union security agreement. Yet, Burke attempted to thwart that will of the majority with his petition.

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Authorities in Support of Motion for Preliminary Injunction, its Reply Memorandum of Points and Authorities in Support of Temporary Restraining Order, and its Reply Memorandum in Support of Preliminary Injunction, and in the following sections, the plain language of §9(e)(1), the construction of its language by courts and the NLRB itself, and the legislative history of the provision make clear that the Board may only order an election based on a petition signed by 30 percent of the members of a bargaining unit at such time as they are covered by an agreement containing a union security clause.

D. DEFENDANTS IGNORE THE PLAIN LANGUAGE, STATUTORY HISTORY, AND ADJUDICATORY CONSTRUCTION OF NLRA § 9(e)(1).

Defendants' arguments regarding the proper construction of NLRA § 9(e)(1) boil down to a summary of the NLRB majority's analysis, which is what Plaintiff has argued was an exercise in extra-jurisdictional overreaching by the Board that lacked any foundation in the text, adjudicatory construction, and legislative history of § 9(e)(1).

The crux of Defendants' argument is that (1) the language of Section 9(e)(1) is "inconclusive" as to when signatures in support of a de-authorization petition must be gathered; and (2) the legislative history in some general sense evinced Congress' continued intent to preserve the rights of employees to recind a union security provision to which they objected if 30 percent of the employees covered by such a provision petitioned for an election regarding its removal. Based on those two points, the NLRB majority and the Defendants to this action reach the conclusion that the Board possesses jurisdiction to order an election based on a de-authorization petition signed by employees who were not covered by an agreement containing a union security clause.

The flaws in Defendants arguments, as argued in Plaintiff's Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, its Reply Memorandum of Points and Authorities in Support of Temporary Restraining Order, and its Reply Memorandum in Support of Preliminary Injunction, are threefold. First, the plain language of §9(e)(1) makes clear that the de-authorization procedure is available only to employees who are covered by a collective bargaining agreement containing a union security clause. Section 9(e)(1) of the NLRA, 29 U.S.C. § 159(e)(1),

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states,

> Upon the filing with the Board, by 30 per centum or more *of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to Section 8(a)(3)*, of a petition alleging the desire that such authority be *rescinded*, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(Emphasis added.)

Writing in dissent from the NLRB majority's faulty analysis, Member Walsh observed that the majority "strains to find an ambiguity in the statutory language that simply is not there." (D.&O. at p. 7.) Nothing in the statutory language suggests that employees need only be covered by a union security clause when a de-authorization petition is filed, as opposed to when the signatures are gathered. As Member Walsh observed:

> The plain meaning of Section 9(e)(1) is that the showing of interest for a deauthorization petition must be gathered at a time when the employees are actually subject to a union-security provision. The statute explicitly says that a deauthorization petition must be supported by 30 percent or more of the employees "*in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to Section 8(a)(3).*"

(Complaint Ex. 2, p. 6, emphasis in original.)

Thus, "[t]he plain language of the Act dictates that the signatures supporting a deauthorization petition must be signatures of employees who are already subject to an effective union-security provision," Walsh correctly observed. (*Ibid*.) The statute provides that employees covered by a union security agreement may submit a petition in order to "rescind" "such authority", referring to the union security agreement. Contrary to the interpretation advanced by the Defendants herein, the provision does not state that employees can "preclude" a union security agreement, "prohibit", "preempt", or otherwise prospectively divest the Union of its authority to negotiate such an agreement. The statute states that if at least 30 percent of the employees who are *covered* by a union security agreement negotiated pursuant to NLRA § 8(a)(3) sign a petition, they can request an election to "*rescind*" the authority contained in the agreement. As noted by Member Walsh,

> The Board is not free to speculate as to Congressional intent where – as here – the text of the statute clearly addresses the question at hand. The plain

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> language of the Act dictates that the signatures supporting a deauthorization petition must be signatures of employees who are already subject to an effective union-security provision.

(D.&O. at 7.)

The second flaw in Defendants' analysis is that it conflicts with the legislative history of § 9(e)(1). Walsh also reviewed the legislative history of § 9(e)(1) (discussed *infra*), and observed that in 1951, Congress eliminated a requirement that Union security clauses, to be effective, must be authorized by a majority vote of the bargaining unit. Walsh observed,

> In eliminating authorization elections and devising the current statutory scheme, Congress explicitly aimed to avoid the unnecessary and inefficient expenses involved in the authorization process, while simultaneously protecting the right of employees to choose to free themselves of an unwanted union-security clause.

(*Id*. at p. 7, citing H.R. Rep. No. 1082, 82d Cong., 1st Sess., at 2-3 (1951).)

Walsh reasoned that "[u]sing Board resources to conduct an election when the majority of the signatures supporting the petition were collected before the parties even began negotiating a contract exemplifies the kind of inefficiency that Congress sought to eliminate by doing away with authorization elections." (*Ibid*.) At the same time, Walsh noted, "dismissing the petition leaves intact the right of employees to promptly deauthorize the union-security clause if they desire to do so." (*Id*.)

Member Walsh's dissent is rooted in detail in the legislative history of current section 9(e)(1), while the Board Majority's and Defendants' argument for creation of a new procedure to allow employees to prospectively preclude or preempt a union's ability to negotiate a union security clause in the first place has no basis in the legislative history. The only support Defendants offer for imputing to Congress the creation of such a new procedure by way of the amendments to the NLRA in 1951 is the fact that Congress evinced a continued generalized intent to allow employees covered by a union security provision an opportunity to petition for its recission. That generalized observation of Congressional intent does not override the more specific legislative history discussed in Plaintiff's Memorandum of Points and Authorities in Support of Preliminary Injunction and summarized briefly as follows.

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The original § 9(e)(1), enacted through the Taft Hartley amendments to the Wagner Act in 1947, required that, before a union security clause could go into effect, it must be ratified or authorized by a majority vote of affected bargaining unit members in a secret ballot election. (Section 9(e)(1), LMRA, 1947, Chapter 120, Public Law 101, *United States Code Congressional and Administrative Service*, 8th Congress, First Session, 1947.) Once a union had been certified as an exclusive bargaining agent and had negotiated with the employer a collective bargaining agreement containing a union security clause, it remained necessary for parties who supported the union security clause to petition for an election regarding the clause. Only after a majority of the bargaining unit members approved giving the union the authority to "make" such a union security agreement could the provision go into effect.

The 1947 version of Section 9(e)(2) was worded nearly exactly as current Section 9(e)(1) (with the exception of its reference to former Section 8(a)(3)(ii), which is not at issue herein), thereby granting employees in a unit covered by a Union security clause which had previously been approved through an election the ability to petition for its recission. (*Id*. at § 9(e)(2).)

Section 9(e) was amended again in 1951. The most significant of the changes, as recounted by House Report No. 1082, was to "…dispense with the requirement of existing law that an election be held before a labor organization and an employer may make a union-shop agreement" because such authorization elections "have imposed a heavy administrative burden on the Board, have involved a large expenditure of funds, and have almost always resulted in a vote favoring the union shop." (*United States Code Congressional and Administrative Service*, 82nd Congress, First Session, 1951, House Report No. 1082 at pp. 2379-2381 ("H.R. Rep. No. 1082"), pp. 2380-2381.) To implement this change, the Bill eliminated the requirement for an election to authorize a union shop agreement by deleting § 9(e)(1). The Bill then re-codified the text of § 9(e)(2) to its current location at § 9(e)(1), thereby leaving in place the procedure for employees in a bargaining unit covered by a union security agreement to petition for an election regarding whether to de-authorize the union security clause.

There is nothing in the legislative history to suggest that Congress intended to create a *new* procedure through which employees could be organized to prospectively hamstring their

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representative from negotiating for a union security clause. To the contrary, the retention of the identical de-authorization language from old § 9(e)(2) and simultaneous elimination of the authorization election requirement from old § 9(e)(1), particularly in light of the rationale for the change – namely that authorization elections were in essence mere formalities, strongly indicates that Congress intended the de-authorization procedure to apply, as the statute states on its face, only to employees covered by an agreement containing a union security provision.

The third defect in Defendants' statutory construction argument, as discussed in the following section, is that case law, including the Board's own earlier ruling in *Great Atlantic & Pacific Tea Company*, 100 NLRB 1494 (1952) ("*Atlantic*") have, consistent with this legislative history, clearly and rationally construed current Section 9(e)(1) as creating a procedure that only becomes available when a union security clause is in effect.

E. DEFENDANTS IGNORE THE LANGUAGE AND SUBSTANCE OF THE NLRB'S PRIOR INCONSISTENT RULING IN *ATLANTIC*.

Defendants simply ignore key language in the Board's earlier, inconsistent ruling in *Atlantic*, *supra*, wherein the Board clearly recognized that the de-authorization procedure set forth at Section 9(e)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(e)(1), becomes available only after a collective bargaining agreement containing a union security clause is in effect. (*Atlantic*, *supra*, 100 NLRB at 1497; accord, *NLRB v. Van Luitt & Co.*, 597 F.2d 681, 684 (9th Cir. 1979) (citing *Atlantic*).

Instead, Defendants resort to a very generalized interpretation of the Board's holding in *Atlantic* and other cases and state that, taken together, the Board's rulings "show a consistent construction of Section 9(e)(1) to protect employees' ability to choose whether to rescind authorization for a union security agreement." (Document 14 at p. 14, lines 6-8.) As with Defendants' discussion of the legislative history, this generalized policy of ensuring that employees have the ability to rescind union security agreements to which they object does not, in any way, explain the NLRB's imputation to Congress a silently expressed intent in 1951 to create a new, prospective procedure that did not exist in the very text that Congress left in place when it

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eliminated the authorization election procedure.

Defendants ignore key language from *Atlantic* (cited in Plaintiff's Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, its Reply Memorandum of Points and Authorities in Support of Temporary Restraining Order, and its Reply Memorandum in Support of Preliminary Injunction) that unequivocally undercut Defendants' arguments. For example, the Board observed in *Atlantic* that:

> That fundamental protection was accorded employees under the amended procedure by providing a method, *negative instead of affirmative*, and *subsequent instead of precedent*, for determining their desires. Thus, Congress by the 1951 amendments, accomplished its purpose of eliminating the prior costly authorization elections but retaining the earlier safeguard. This was done by giving labor organizations a *presumptive authority to enter into union-shop agreements and at the same time providing an escape for any unwilling majority covered by such an agreement*, through the opportunity afforded by Section 9(e)(1) for an affirmative deauthorization vote.

(100 NLRB at 1497, emphasis added.) The Board clearly understood the Congressional intent in 1952, a year after the amendment: By removing the authorization procedure and leaving in place the de-authorization procedure, Congress created a presumptive right for a union to negotiate a union security provision and *retained* the procedure by which employees who objected to such an agreement could sign a petition, if they numbered 30 percent of the bargaining unit covered by the agreement or greater, to *rescind* the agreement. Defendants offer no explanation for the Board's departure from its own well-reasoned precedent.

Moreover, Defendants' attempt to contort *Atlantic* to justify the Board's action in this case fails on its own logic. The contention that Congress wanted to avoid *any* delay in implementing employees' desire not to be subject to a union security clause, as the Defendants would have this Court view *Atlantic* as holding, is contradicted by the fact, which Defendants do not dispute, that *filing* of a de-authorization petition must wait until after a union security clause is in effect. Why waste everyone's time by forcing employees to wait until the Union has negotiated such a clause before they can file the petition if avoiding delay is the goal? Yet Defendants impute to Congress a sudden abhorrence to such delay when it is pointed out that the statute also requires that signatures for the petition must be gathered after the agreement is in effect. The language of the statute, cases

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(including *Atlantic*) that have interpreted it, and its legislative history all make clear that the entire de-authorization procedure, from signature gathering to filing, does not come into play unless and until there is a union security clause to rescind.

F. THE PROPOSED INTERVENER HAS ADDED NOTHING OF SUBSTANCE TO DEFENDANTS' ARGUMENTS.

Plaintiff maintains that intervention should be denied for the reasons set forth in Plaintiff's Opposition to Motion for Leave to Intervene. The proposed Intervener's failure to add anything of substance to Defendants' arguments in support of their Motion to Dismiss further demonstrates that granting Intervention would be inappropriate.

Plaintiff further notes that proposed Intervener purports to base its Motion to Dismiss, at least in part, on Fed.R.Civ.P. 12(c), Motion for Judgment On the Pleadings. Per the terms of Rule 12(c), where, as here, material has been submitted in addition to the pleadings themselves, the Motion shall be treated as one for Summary Judgment. Accordingly, proposed Intervener would be required to show, which it clearly cannot, that there is no genuine disputed issue of material fact and that Defendants are entitled to Judgment as a matter of law. Not even Defendants themselves have moved for Summary Judgment, surely because doing so would be grossly premature. Proposed Intervener therefore adds only make-work to this proceeding and contributes nothing to the substantive adjudication of the merits at issue.

IV. CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Motion(s) to Dismiss should be denied.

Dated: June 13, 2007

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